

1 The Petition appears to challenge Petitioner's 2012 conviction after a
 2 guilty plea for attempted murder, use of a deadly weapon, burglary, and
 3 kidnapping. Petition at 2. Petitioner alleges that his trial counsel was
 4 constitutionally ineffective, that the prosecutor committed misconduct, and
 5 that he is mentally incompetent. Id. at 5-14.

6 It plainly appears from the face of the Petition that the Petition is wholly
 7 unexhausted because Petitioner has not presented his claims to the California
 8 Supreme Court. See Petition at 2-3. Accordingly, as explained below, the
 9 Court must dismiss this action without prejudice pursuant to Rule 4 of the
 10 Rules Governing Section 2254 Cases in the United States District Courts, for
 11 failure to exhaust his state court remedies.²

14 any or all proceedings in a jury or nonjury civil matter and order the entry of
 15 judgment in the case." 28 U.S.C. § 636(c)(1). Here, Petitioner is the only
 16 "party" to the proceeding and has consented to the jurisdiction of the
 17 undersigned U.S. Magistrate Judge. Respondent has not yet been served and
 18 therefore is not yet a party to this action. See, e.g., Travelers Cas. & Sur. Co. of
 19 Am. v. Brenneke, 551 F.3d 1132, 1135 (9th Cir. 2009) ("A federal court is
 20 without personal jurisdiction over a defendant unless the defendant has been
 21 served in accordance with Fed.R.Civ.P. 4."). Thus, all parties have consented
 22 pursuant to § 636(c)(1). See Wilhelm v. Rotman, 680 F.3d 1113, 1119-21 (9th
 23 Cir. 2012) (holding that magistrate judge had jurisdiction to sua sponte dismiss
 24 prisoner's lawsuit under 42 U.S.C. § 1983 for failure to state claim because
 25 prisoner consented and was only party to the action); Carter v. Valenzuela,
 No. 12-05184, 2012 WL 2710876, at *1 n.3 (C.D. Cal. July 9, 2012) (after
Wilhelm, finding that magistrate judge had authority to deny successive
 habeas petition when petitioner had consented and respondent had not yet
 been served with petition); see also Bilbua v. Los Angeles Sup. Ct., No. 15-
 3095, 2015 WL 1926014, at *1 (C.D. Cal. Apr. 27, 2015).

26 ² Rule 4 states that a district court may summarily dismiss a habeas
 27 corpus petition before the respondent files an answer "[i]f it plainly appears
 28 from the face of the petition . . . that the petitioner is not entitled to relief."

II.

DISCUSSION

A federal court will not grant a state prisoner's petition for writ of habeas corpus unless it appears that the prisoner has exhausted available state remedies. 28 U.S.C. § 2254(b), (c); Baldwin v. Reese, 541 U.S. 27, 29 (2004); O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999). "For reasons of federalism, 28 U.S.C. § 2254 requires federal courts to give the states an initial opportunity to correct alleged violations of its prisoners' federal rights." Kellotat v. Cupp, 719 F.2d 1027, 1029 (9th Cir. 1983) (citation omitted).

Exhaustion requires that the prisoner's contentions be fairly presented to the state courts and be disposed of on the merits by the highest court of the state. See James v. Borg, 24 F.3d 20, 24 (9th Cir. 1994). Moreover, a claim has not been fairly presented unless the prisoner has described in the state court proceedings both the operative facts and the federal legal theory on which his claim is based. See Duncan v. Henry, 513 U.S. 364, 365-66 (1995); Picard v. Connor, 404 U.S. 270, 275-78 (1971). As a matter of comity, a federal court will not entertain a habeas corpus petition unless the petitioner has exhausted the available state judicial remedies on every ground presented in the petition. See Rose v. Lundy, 455 U.S. 509, 518-22 (1982).

A federal court may raise a habeas petitioner's failure to exhaust state remedies sua sponte. Stone v. City and Cnty. of San Francisco, 968 F.2d 850, 855-56 (9th Cir.1992). Petitioner has the burden of demonstrating he has exhausted available state remedies. See, e.g., Williams v. Craven, 460 F.2d 1253, 1254 (9th Cir. 1972) (per curiam); Rollins v. Superior Court, 706 F. Supp. 2d 1008, 1011 (C.D. Cal. 2010).

Here, Petitioner affirmatively states that he has not presented the claims in the Petition to the California Supreme Court either by way of a petition for review or a petition for writ of habeas corpus. See Petition at 3-4. Petitioner

1 alleges that he did not appeal his convictions because he “did not understand
2 the law and was never told by the court or [the] public defender that [he] could
3 appeal.” Petition at 3. This allegation is insufficient to excuse Petitioner’s
4 failure to properly present and exhaust his claims before the state courts. See
5 Rhines v. Weber, 544 U.S. 269, 277 (2005) (requiring good cause for
6 petitioner's failure to exhaust); Wooten v. Kirkland, 540 F.3d 1019, 1024 (9th
7 Cir. 2008) (holding that petitioner's belief that appellate counsel raised a claim
8 before state court did not constitute good cause); Hughes v. Idaho State Bd. of
9 Corrections, 800 F.2d 905, 909 (9th Cir. 1986) (holding that illiterate pro se
10 litigant's reliance on another inmate's assistance was not sufficient cause).
11 Accordingly, it appears from the face of the Petition that Petitioner cannot
12 meet his burden to demonstrate that his claims have been exhausted.

13 If it were nonetheless clear that Petitioner’s unexhausted claims were
14 procedurally barred under state law, then the exhaustion requirement would be
15 satisfied. See Castille v. Peoples, 489 U.S. 346, 351-52 (1989); Johnson v.
16 Zenon, 88 F.3d 828, 831 (9th Cir. 1996). However, the Court concludes that it
17 is not clear that the California Supreme Court will hold that Petitioner’s
18 unexhausted claims are procedurally barred under state law if Petitioner were
19 to raise them in a habeas petition to the California Supreme Court, as such a
20 proceeding is an original proceeding which is not subject to the same
21 timeliness requirement as a petition for review of a Court of Appeal decision.
22 See, e.g., In re Harris, 5 Cal.4th 813, 825 (1993) (granting habeas relief where
23 petitioner claiming sentencing error, even though the alleged sentencing error
24 could have been raised on direct appeal); People v. Sorensen, 111 Cal. App.2d
25 404, 405 (1952) (noting that claims that fundamental constitutional rights have
26 been violated may be raised by state habeas petition). The Court therefore
27 concludes that this is not an appropriate case for invocation of either statutory
28 “exception” to the requirement that a petitioner’s federal claims must first be

1 fairly presented to and disposed of on the merits by the state's highest court.

2 See 28 U.S.C. § 2254(b)(1)(B).

3 Once a Court determines that a habeas petition contains only
4 unexhausted claims, it may dismiss the petition for failure to exhaust. Rasberry
5 v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006). Accordingly, because the
6 Petition in this case is wholly unexhausted, dismissal is appropriate.

7 **III.**

8 **CONCLUSION**

9 IT IS THEREFORE ORDERED that the Petition is dismissed without
10 prejudice for failure to exhaust state remedies.

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12 Dated: June 8, 2015



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14 DOUGLAS F. McCORMICK
15 United States Magistrate Judge
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